No. 02-1415

MAY 6

In The

Supreme Court of the United States

GRAND AERIE, FRATERNAL ORDER OF EAGLES,

Petitioner,

v.

TENINO AERIE NO. 564, FRATERNAL ORDER OF EAGLES; KATHLEEN J. CONNER; LANETTE DAVIS; JULIA A. FOSTER; GAYLE L. HARTMAN; KAYCEE L. JOHNSON; ANNETTE RILEY; DIANNE E. ROBERTS; JANET TRESENTRITER; ALICE F. VASSAR; and WHIDBEY ISLAND AERIE NO. 3418, FRATERNAL ORDER OF EAGLES,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Washington

PETITIONER'S REPLY BRIEF

JOHN WARNER WIDELL
Counsel of Record
WIDELL | APPELLATE
5102 Ballard Avenue NW, Suite 4
Seattle, Washington 98107
(206) 706-9119

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTRODUCTION

Both Respondents' Brief in Opposition to Petition for Certiorari and the Washington Supreme Court opinion in this case incorrectly apply standards relating to "intimate association." The Eagles are not claiming "intimate association." The Eagles' claim is that application of the Washington Law against Discrimination to Eagles' membership decisions interferes with the Eagles' rights to expressive association. On that claim, Respondents, like the Washington Supreme Court, cite no principled distinction between the present case and this Court's expressive association jurisprudence, including the Court's recent decision in *Boy Scouts of America v. Dale,* 530 U.S. 640 (2000).

Respondents do not dispute that this case presents an issue that affects millions of members of social fraternities like the Eagles, the Moose, and the Masons. As both the Petition for Certiorari and the Brief of Amici Curiae filed in support of the Petition make clear, this case affects millions of Americans who value group fellowship with members of the same gender. The federal constitutional issue presented by this nationally important case is exactly the kind of issue this Court should resolve by writ of certiorari.

DISCUSSION

I. Both the Brief in Opposition and the Washington Supreme Court Opinion Incorrectly Apply "Intimate Association" Rules to an "Expressive Association" Case.

In *Roberts v. U.S. Jaycees*, 468 U.S. 609, 626 (1984), this Court considered claims of both "intimate" and "expressive" association rights. The factors set forth by both the Washington Supreme Court and the Brief in Opposition – "size, purpose, policies, selectivity, congeniality, and other characteristics pertinent to the particular case" – are the factors set forth in *Roberts* for evaluating a claim of intimate association. 468 U.S. at 620. This Court applied those factors to find that the Jaycees is not the sort of intimate association that merits constitutional protection. *Id.* at 621. The Court then turned to the separate question whether the Jaycees' rights to expressive association were infringed. *Id.* at 622.

The question considered by the U.S. Supreme Court in *Boy Scouts of America v. Dale*, 530 U.S. 640 was whether forced inclusion of a homosexual leader violated the "expressive association" rights of the Boy Scouts. There is no discussion of the size or selectivity of the organization because those factors are not relevant to a claim of expressive association.

The Eagles' claim is that forced inclusion of women interferes with the right to engage in expressive association. Accordingly the rules for evaluating "expressive association" claims apply.

II. This Court's Holding in *Boy Scouts of America v. Dale* Precludes the State of Washington from Forcing Inclusion of Women in Eagles Aeries.

In *Dale*, this Court set forth a two part test for evaluating First Amendment expressive association. First, the Court must "determine whether the group engages in expressive association," defined to be "some form of expression, whether it be public or private." *Dale*, 530 U.S. at 648. Second, the Court must determine whether the challenged governmental action "would significantly burden" that expression. *Id.* at 653.

Respondents' Brief in Opposition claims that the *Dale* case is different from this case because the Boy Scouts is a "private" group and the Eagles is a "public" group. The Brief cites this Court's brief description of the Boy Scouts as "a private, not-for-profit organization." *Id.* at 644. In the context of the opinion, the Court is obviously using the term private to mean non-governmental. There is no suggestion in *Dale* that the Boy Scouts is private in the sense that it is a small, intimate, or highly selective group. The *Dale* decision does not even consider these factors because the only question decided is whether New Jersey violated the Boy Scouts' right to engage in expressive association. *Id.* at 644.

The Brief in Opposition also attempts to distinguish the *Dale* case by claiming that inclusion of women is not antithetical to the Eagles' message. Contrary to Respondents' suggestion, the very name "Fraternal Order of Eagles" and numerous other references in the founding documents of the organization make clear that the organization expresses the value of brotherhood and therefore limits aerie membership to males. App. 156-180. The record also demonstrates that the secret rituals of the

Order inculcate and express both "manly virtues" and the value of an all-male brotherhood. App. 116-17.

When the Grand Aerie considered whether to bow to legal pressure and admit women, the group, composed of representatives from aeries all over the country, voted overwhelmingly in favor of a resolution stating that "a Male is a Man, a Female is a Woman, a Man is a Brother, a Woman is a Sister; a Brother belongs to the Aerie, a Sister belongs to the Auxiliary" and declining to substitute the word "person" for the word "man" in Eagles membership criteria. App. 141, 151. The forced inclusion of women would preclude the Eagles from expressing the value of an all-male social brotherhood and an all-female sisterhood because they would no longer be able to hold meetings separated by gender. Separating by gender is the essence of the Eagles' expressive association regarding this issue.

Respondents also claim that the Eagles have lost their right to expressive association because they admitted some women and because the brotherhood message is inconsistent with other statements by the organization. In *Dale*, the Court rejected the same kinds of arguments. Rejecting claims that the Boy Scouts had inconsistently expressed or acted on their beliefs, the Court explained that the fact an organization "does not trumpet its views from the housetops, or that it tolerates dissent within its ranks, does not mean that its views receive no First Amendment protection." *Id.* at 656.

The State of Washington has no legitimate interest sufficient to outweigh the Eagles' right to free expression. The Washington Supreme Court accepted that "the organization advances only social and charitable activities and that it prohibits promotion of business or economic

interests by its members." Opinion, App. 3. Requiring the Eagles to admit women would serve to eradicate the Eagles' message that there is value in group fellowship among members of the same sex. As this Court explained in *Dale*, "public or judicial disapproval of a tenet of an organization's expression does not justify the State's effort to compel the organization to accept members where such acceptance would derogate from the organization's expressive message." *Id.* at 661. "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Id.* (citing *Hurley v. Irish-Amer. Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 579 (1995)).

CONCLUSION

This Court should resolve this nationally important First Amendment dispute by writ of certiorari to the Washington Supreme Court.

Respectfully submitted,

JOHN WARNER WIDELL
Counsel of Record
WIDELL | APPELLATE
5102 Ballard Avenue NW, Suite 4
Seattle, Washington 98107
(206) 706-9119